

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

UNITED STATES OF AMERICA, et al .CIVIL ACTION NO. 05-10112-RCL
Plaintiffs .

V. .BOSTON, MASSACHUSETTS
.DECEMBER 20, 2007

THE COMMONWEALTH OF MASS., et al.
Defendants .
.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LEO T. SOROKIN
UNITED STATES MAGISTRATE JUDGE

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P R O C E E D I N G S

COURT CALLED INTO SESSION

THE CLERK: Today is December 20th. The case of United States v. the Commonwealth of Massachusetts, Civil Action 05-10112 will now be heard before this Court. Counsels, please identify themselves for the record.

MR. BRESSLER: Steven Bressler with the U.S. Department of Justice Civil Division on behalf of the United States, the plaintiff. With me at counsel table is Captain Fred Kenney, K-E-N-N-E-Y, First District Legal Officer for the Coast Guard.

THE COURT: Okay. Good afternoon, Mr. Bressler, and Mr. Kenney.

MR. HACHEY: Andrew Hachey, Nixon Peabody, on behalf of the intervener plaintiffs. With me is Jonathan Benner from Troutman Sanders, also for the intervenor plaintiffs.

THE COURT: Okay. Benner or Brenner?

MR. BENNER: Benner, Your Honor.

THE COURT: Benner. Okay. Good afternoon.

MR. BENNER: Good afternoon.

MR. CRAY: Good afternoon, Your Honor, Pierce Cray, Assistant Attorney General for the Commonwealth. With me is Seth Schofield, also an Assistant Attorney General in the Environmental Protection Division.

THE COURT: All right. Good afternoon, Mr. Cray and

1 Mr. Schofield.

2 MR. ETTINGER: Good afternoon, Your Honor, Jonathan
3 Ettinger from Foley Hoag for the Coalition for Buzzards Bay.
4 With me is Elisabeth DeLisle also from Foley Hoag.

5 THE COURT: Okay. Good afternoon. Well, Mr.
6 Bressler, it's your motion so I'll hear you first. I've read
7 your papers - two I have from you, right, memo and a
8 supplemental memo?

9 MR. BRESSLER: Yes.

10 THE COURT: And I have from Mr. Cray an opposition
11 and a supplemental opposition. And then from the intervenor
12 coalition I have a memorandum. There isn't a memorandum I
13 missed that's from Mr. Benner or Mr. Hachey or from you, is
14 there?

15 MR. BRESSLER: No, there is not.

16 THE COURT: Okay. All right. So, go ahead. Let me
17 actually, now that I told you to go ahead, start with my first
18 question. I want to see if I understand the issues correctly.
19 You're proceeding under Title, at this moment, not in the
20 litigation generally but at this moment on this motion under
21 Title I, right?

22 MR. BRESSLER: That's right, Your Honor. The parties
23 agree that - there are two provisions at issue--

24 THE COURT: Yep.

25 MR. BRESSLER: --now remaining in the litigation, the

1 tug escort provision that the state put forth which all
2 parties agree is governed under Title I and the Manning
3 provision. The United States believes that Title II applies
4 there but there's no need to get to that. If it was Title II
5 we all agree it would be field preempted. Assuming Title I
6 applied as the Commonwealth argues, we are now arguing that it
7 is preempted under the most recent rule as well.

8 THE COURT: So for these purposes it's simply a
9 decision on Title I preemption.

10 MR. BRESSLER: That's correct.

11 THE COURT: And if you lose you might come back on as
12 to the Manning on Title II or overlap for something but you say
13 Title I now only.

14 MR. BRESSLER: That's right, Your Honor.

15 THE COURT: Okay. Now--

16 MR. BRESSLER: Title I on both.

17 THE COURT: --the First Circuit, one question I have,
18 as the First Circuit said, they use a word that - I take notice
19 so, must, as in the district court must engage in overlap
20 analysis when it comes back, and is that - they say, this is on
21 page 13 of the published opinion if you have that copy, with
22 regard to the Manning requirement before us, however, the
23 district court must undertake an overlap inquiry including a
24 full consideration of the various lock factors. Further,
25 development of the record is an order resolve this point. Is

1 it your view that the Title I analysis is sufficient there
2 because, I mean, I guess the question is is the overlap
3 analysis sort of inapplicable now because you're only
4 proceeding on Title I for the moment?

5 MR. BRESSLER: Yes, Your Honor. I think, I mean in
6 context must means because we say Title II and they say Title I
7 therefore its not enough to just as Judge Tauro did and we
8 believe properly of course, but as Judge Tauro did, to say,
9 yes, Title II that there needed to be further development and
10 therefore that had to happen. But because we're saying it's
11 preempted either way--

12 THE COURT: So is overlap analysis just something to
13 employ to determine whether to engage in Title II, field
14 preemption analysis or Title I conflict preemption analysis?

15 MR. BRESSLER: Yes, Your Honor.

16 THE COURT: Okay. All right. Okay, so what do you
17 think as a general matter you have to show to prevail under
18 Title I?

19 MR. BRESSLER: I think to prevail under Title I--

20 THE COURT: Simply that you said preemption so that
21 your intent is clear and that it's not inconsistent with
22 clearly expressed congressional intent?

23 MR. BRESSLER: Yes, Your Honor, that the Coast Guard
24 has either issued a regulation or decided that there shouldn't
25 be a regulation like the Commonwealth has. That it's clearly

1 the First Circuit said you haven't given us enough on conflict
2 preemption or for us to know your intent here based on the
3 earlier portions of the administrative record so we need more,
4 we need a clearer statement.

5 THE COURT: To know whether the Coast Guard - in
6 other words they said you haven't clearly expressed your intent
7 to preempt.

8 MR. BRESSLER: Correct.

9 THE COURT: All right. And now you say we've done
10 it, we said we intend to preempt, we do preempt in the federal
11 register.

12 MR. BRESSLER: Yes. And they've done it through
13 notice and comment rule making that is clearly authorized under
14 Federal I of PWSA and the extensive authority that Congress had
15 vested the executive branch, the secretary and the Coast Guard
16 under that title.

17 THE COURT: And then second you just have to show
18 that it's not the inconsistent but clearly expressed
19 congressional intent and then you're done?

20 MR. BRESSLER: Yes.

21 THE COURT: What about what they say about the Court
22 would review whether the decision to preempt constitutes a
23 reasonable accommodation to conflict in policies. Are you
24 familiar with that section of the opinion?

25 MR. BRESSLER: Yes. I would think that that is

1 essentially dovetails with a rational basis test under the APA
2 and arbitrary and capricious review and that in light of the
3 clearly expressed congressional intent has the United States
4 done something that has a rational basis and that isn't in
5 conflict with clearly expressed congressional intent?

6 THE COURT: Do you really think they're the same? I
7 mean here's the reason I ask the question. I'll just tell you
8 what I'm thinking. It seems, I'll wait to hear from Mr. Cray
9 too, but it seems like you've pretty clearly said you intend to
10 preempt. I'm not sure how much clearer you can say it than
11 expressly saying it as you did, but, and is it inconsistent
12 with clearly expressed congressional intent? That's a pretty
13 deferential standard to you. But then whether it constitutes a
14 reasonable accommodation of conflicting policies that seems to
15 me to be a certainly more rigorous analysis than clearly, than
16 inconsistent but clearly expressed congressional intent. And
17 it seems to suggest looking at something different than merely
18 statutes, which is what the first part would suggest an
19 analysis of. So that's what I'm wondering about. I mean and
20 I'm not sure you addressed that particularly in your papers.

21 MR. BRESSLER: Yes, but we did not, we didn't file a
22 reply because we, none was allowed under the local rules and
23 did not see the need to file a reply. So we didn't really
24 respond to the arguments raised in their oppositions.

25 THE COURT: You can respond now if you want.

1 MR. BRESSLER: I would like to. I think a
2 reasonable accommodation of conflicting policies in those cases
3 it does mean, you know, is this the better, originally better
4 than what they're doing?

5 THE COURT: Sure.

6 MR. BRESSLER: The First Circuit explicitly says--

7 THE COURT: Right. I understand that.

8 MR. BRESSLER: --let's not deal with that. I think
9 it dovetails with the APA arbitrary and capricious standard
10 Title 5, U.S. Code Section 706, is it arbitrary and capricious
11 and the use of discretion otherwise not in accordance with the
12 law. And as the First Circuit has held and the Supreme Court
13 has held that standard of review is a narrow one where, again,
14 the Court doesn't substitute its judgment. It says is this, is
15 what the agency has done rational and has it provided a
16 rational explanation for what it's done?

17 Here, in terms of taking first the tug escorts, the
18 United States has said we're going to go this far but no
19 farther. We think that is the appropriate balance. The reason
20 that we're going to go this far is because Buzzards Bay is kind
21 of shallow and rocky. There have been groundings due to human
22 error. That has been the cause of the oil spills that we've
23 had there before therefore a tug escort on a single hulled
24 vessel will help prevent that and prevent the human error that
25 would cause that.

1 On a double hulled vessel there's never been an oil
2 spill from a double hulled vessel in this water. The double
3 hull itself in combination with the other things we're doing
4 provides enough protection and for that matter if you look
5 through the administrative record you can see that there - I
6 mean and when I say that we haven't filed the administrative
7 record yet but if you look just at Federal Register notices its
8 clear there's also a concern of not crowding up the bay, not
9 having too many vessels there so that the helpers become a
10 hindrance. The Commonwealth may not agree with all that.

11 THE COURT: Second part of the escort requirement
12 implies that their regulation required even in a little lower
13 threshold of size barge that required an escort as well. One
14 difference is the double hull.

15 MR. BRESSLER: Yes.

16 THE COURT: They require it with a double hull and
17 you don't.

18 MR. BRESSLER: Yes.

19 THE COURT: And you start at 10,000 and they start at
20 6,000 and so the six to 10,000 is a difference too?

21 MR. BRESSLER: I think we start at six and they start
22 at five.

23 THE COURT: Oh, so it's just the difference between
24 five and 6,000.

25 MR. BRESSLER: Yes.

1 THE COURT: Okay. All right. Yeah, Mr. Cray, is
2 there--

3 MR. CRAY: Actually, I think it is five and six but
4 they're actually five and we're actually six. We're actually a
5 little higher.

6 THE COURT: Oh.

7 MR. BRESSLER: Okay.

8 THE COURT: Okay.

9 MR. BRESSLER: Yes.

10 THE COURT: So the only difference there is the
11 double hull?

12 MR. BRESSLER: Right. The only difference is the
13 double hull. As the Coast Guard has expressed, they're also
14 trying - there's a federal law that's phasing out single hulled
15 barges by 2015. The Coast Guard doesn't have the authority to
16 just do that by FIAT sooner than Congress said. But here in
17 Buzzards Bay what's the Coast Guards doing also provides an
18 incentive for ship owners to move more quickly to double hulled
19 vessels cause then they don't need to higher a tug escort. And
20 what the Commonwealth has done obliterates that incentive. But
21 the primary reason is simply that what the U.S. is doing is the
22 appropriate amount of regulation. The Coast Guard has decided
23 to go this far and no farther. Congress has clearly over the
24 last seventy some years, and really since the founding of the
25 Republic, given a great deal of deference to the United States

1 in setting Maritime rules. There's certainly no presumption
2 against preemption as the First Circuit held and that therefore
3 what the United States has done is reasonable, is not contrary
4 to any clearly expressed congressional intent and it's
5 preempted.

6 THE COURT: What about these differing, well it's
7 different positions or regulations in different parts of the
8 country that sound substantially similar to the Commonwealth's
9 regulation which mesh with what sounds like substantially
10 similar other regional regulations of the Coast Guard but which
11 the Coast Guard did not elect to preempt.

12 MR. BRESSLER: Well, I wouldn't say there are really
13 many in different parts of the country. There is--

14 THE COURT: It sounds like, from what I understand
15 swirling about, there's four, San Francisco, L.A., Puget Sound,
16 three I guess or in San Diego, made in four.

17 MR. BRESSLER: Under Title I a state can do what it
18 wants and it's not preempted unless there is some affirmative
19 decision by the federal government. Here the federal
20 government has made an affirmative decision. For whatever
21 reason it didn't make, it never made that decision in San
22 Francisco or LA. I think the Commonwealth is trying to argue
23 that there was a decision that there is no conflict between the
24 Puget Sound tug escort rule and the federal one. So that's the
25 only one--

1 THE COURT: This rule here is applicable only in
2 what amounts to the New England region. It's the Coast Guard
3 region but it's roughly New England waters.

4 MR. BRESSLER: Yes. Well there's a New England
5 regional rule the First Coast Guard district regulated
6 navigation therein.

7 THE COURT: That's 165 100.

8 MR. BRESSLER: Exactly. And the most recent rule
9 modifies that essentially as to Buzzards Bay. So it is
10 narrower.

11 THE COURT: Okay. So the Buzzards Bay Rule that
12 preempts, that states the Coast Guard's clear intention to
13 preempt is applicable only in Buzzards Bay.

14 MR. BRESSLER: Right.

15 THE COURT: Are there other special interest waters
16 as defined under state law. Is that a state law term, Mr.
17 Cray, special interest waters?

18 MR. CRAY: Yes, Your Honor, with respect to the tug
19 escort. And there are two other ones the statute defines,
20 Vineyard Sound and Mount Hope Bay. And I should note that the
21 federal, the new federal regulation that Mr. Bressler's relying
22 upon only addresses Buzzards Bay. It doesn't--

23 THE COURT: Right.

24 MR. CRAY: --address the other two. So we would be
25 subsequently arguing that certainly even if one accept

1 everything Mr. Bressler is saying about his new, their new
2 regulation, vis-a-vis Buzzards Bay provides no basis for
3 striking the state statute vis-a-vis Vineyard Sound--

4 THE COURT: And Mount Hope.

5 MR. CRAY: --and Mount Hope Bay. That should remain
6 open for further proceedings.

7 THE COURT: So that's right as to right now; is it
8 not? The motion you have is premised for so far just on, not
9 so far - the motion that you filed is premised only on the new
10 regulation and the new regulation is applicable only in
11 Buzzards Bay, right? I mean, I guess what I'm really saying is
12 wouldn't that mean as to the Commonwealth's regulation and to
13 those two other spots that would have to proceed for now under
14 normal - it wouldn't be resolved by the Court's ruling on this
15 motion since this regulation, you've only moved under this new
16 regulation and that's only applicable in Buzzards Bay.

17 MR. BRESSLER: Could I have one minute--

18 THE COURT: Sure.

19 MR. BRESSLER: --Your Honor?

20 PAUSE

21 MR. BRESSLER: Essentially that's correct, Your
22 Honor. I would just add that in 1998 when the Coast Guard
23 promulgated the entire First--

24 THE COURT: First Coast Guard district?

25 MR. BRESSLER: --District RNA, regulated navigational

1 area, at that time they considered tug escorts for Buzzards
2 Bay and decided not to require them then. They've now amended
3 that to require them. So they're amended the regional rule to
4 add a new requirement for Buzzards Bay but the bottom line in
5 answering Your Honor's question is, no, this wouldn't preempt
6 the states rules, tug escort rules in the sound.

7 THE COURT: That would await either further
8 litigation in this case that sort of following up on what the
9 First Circuit said or if the Coast Guard's contemplating some
10 new regulation they impose some new regulation then the
11 application of that new regulation and how it affects the state
12 statute regulations or not.

13 MR. BRESSLER: That's right.

14 THE COURT: Okay. All right.

15 MR. BRESSLER: If I may--

16 THE COURT: Go ahead.

17 MR. BRESSLER: --Your Honor had asked about, what
18 about these other--

19 THE COURT: Yes.

20 MR. BRESSLER: --laws and my first point was even
21 arguably there's only one because there's only one where the
22 Commonwealth is saying that there has been an affirmative
23 decision. They've asked for I guess discovery on what the
24 Coast Guard did 15, 20 years ago, but looking at the public
25 record does not reflect any affirmative decision except

1 arguably in Puget Sound as to whether or not there was a
2 conflict. The Coast Guard just did not act. And I don't
3 think, I mean it's like a decision whether or not to prosecute.
4 I think that's committed to the United States discretion.

5 THE COURT: Is this kind of issue susceptible for the
6 following analogy that, tell me if I'm correct as I go along,
7 you, Coast Guard takes the position, has the authority to I'm
8 going to call it speed limits but tug escort requirements.
9 They have the authority to impose the tug escort requirement if
10 they want to. If they don't, it's Title I. For now we're only
11 in the Title I world. So if they don't impose the tug escort
12 requirement under Title I, then the state is free within
13 whatever authority it has to act or not act as it chooses and
14 it wouldn't run into a preemption vis-a-vis your regulations
15 cause you haven't acted.

16 If you choose to act, you could choose to act and
17 impose a tug escort requirement that said tug escorts are
18 required essentially for anything over what you said, anything
19 over 5,000, is it tons, and 5,000 tons provided it's not a
20 double hull. All right. And you could, whether - you could
21 expressly disclaim any preemptive effect absent, I mean clearly
22 you would preempt in the case of a physical impossibility
23 conflict. But other than that as to imposing a higher standard
24 of regulation, you could expressly disclaim regulation
25 preemptive effect of your regulation or you could not address

1 that. And they could act in that area and if ultimately the
2 Court determines that whatever your position you took that
3 there wasn't a preemptive effect outside, preemptive effect of
4 the, of a higher standard then they could regulate it and it
5 could coexist and or you could elect to exercise authority you
6 say you have to affirmatively preempt saying not only do we say
7 this much is required but we say anything more would conflict
8 with the obstacles of our regulation. And that's essentially
9 what your position is today that that's what you've done in the
10 latest regulation?

11 MR. BRESSLER: Yes, that's our position and I think
12 obviously the United States and the Coast Guard is a good
13 source for learning what its purposes are and what would be an
14 obstacle to these purposes.

15 THE COURT: And so then you're saying these would be
16 the other places - are you saying that to the extent that the
17 record is silent, the rule making record in those other places
18 as to whether or not you affirmatively intended to preempt, are
19 you saying it's not inconsistent in San Diego if this is the
20 case in San Diego to have a similar Coast Guard regulation to
21 this one but not to have it preempt. It's not a statutory
22 preemption. It's a decision to be made in each instance when
23 you regulate it?

24 MR. BRESSLER: Yes, that's right. And it is a
25 decision that - there has been no about face. I mean well

1 there has been an about face in that. As I said in 1998 the
2 United States said tug escort rules are not appropriate for
3 Buzzards Bay and now in 2007 they've said they are appropriate
4 and they've explained that in notice and comment rule making.
5 Now, if tomorrow they turned around and said no they're not,
6 and didn't provide any information, I think that would be a
7 problem because they've just done an about face. But when
8 you're talking about another situation, another body of water
9 on the other side of the country and something that happened 15
10 years ago it's not the kind of about face that poses an
11 administrative law.

12 THE COURT: Well is there - does it suggest an issue
13 if what, I don't know exactly what they're arguing but if this
14 is what they're arguing that there's been a history for a long,
15 15 years, a long period of time, of recognizing, deferring to,
16 allowing, what have you, local state regulation of particular
17 water areas and allowing them to impose this kind of tug escort
18 requirement provide it doesn't affect tanker operations
19 elsewhere and doesn't reach beyond the particulars of local
20 waters and there is some basis in the local orders to do it
21 that there's been a long standing policy of the Coast Guard to
22 permit that kind of regulation and then to reverse field by
23 affirmatively in one situation a preempting as opposed to a
24 uniform across the board decision where it might be a
25 government agency responding to national uniformity or new

1 executive considerations, that that would be suggestive of a
2 problem.

3 MR. BRESSLER: Well--

4 THE COURT: That's essentially what they're arguing I
5 think.

6 MR. BRESSLER: That's what they're arguing and I
7 would say that that is akin to saying that if Your Honor goes a
8 week, I don't know if you do, you know, bail hearings, but if
9 Your Honor does a week conducting bail hearings and gives
10 everyone bail, came in on, you know, a certain charge and then
11 somebody comes in on a similar charge and Your Honor finds a
12 reason to deny bail that's not arbitrary and capricious. It's
13 a case by case analysis effect.

14 THE COURT: No, but you know what they'll say to me.
15 They'll tell me, Judge, Monday, Tuesday and Wednesday you
16 allowed bail on these cases. The charges were the same, they
17 were substantially similar. It's not fair. It's not right.
18 You know, these people stand in the same shoes and you should
19 apply to them uniformly and if that was the law and that's the
20 determination, it ought to be the same determination here. And
21 I think it would put it to me of one of two things; either I
22 would need to sort of being able to explain though why there's
23 something different about those that therefore they're not
24 meaningfully similar or they would appeal to a higher
25 authority, which there are many, and that higher authority

1 would ask me that question and it would engage in that kind of
2 analysis.

3 So I guess that's sort of the question, right? I
4 mean just because you did it doesn't mean that it controls, but
5 does it invite the question of is there something meaningfully
6 different that warrants different treatment or is this rubric
7 of analysis, you know, incorrect?

8 MR. BRESSLER: Well, there's a process for bringing
9 up that kind of complaint in notice and comment rule making.
10 It's making comments, making--

11 THE COURT: Right.

12 MR. BRESSLER: --it a part of the record.

13 THE COURT: Right.

14 MR. BRESSLER: And then if that's a significant
15 issue, then the agency will explain itself. I'm not aware of
16 comments that said, you know, this isn't fair because it's too
17 much like, you know, it's like somewhere else this way, this
18 way and this way. I'm not saying it would be dispositive if
19 there were, but--

20 THE COURT: Right.

21 MR. BRESSLER: --basically it's too late to say that
22 now. They can file a petition for rule making and say, you
23 know, this is unfair because of what you did there.

24 THE COURRT: Can they say it's arbitrary and, could
25 they say here it's arbitrary and capricious on this theory as

1 evidenced by positions the rules taken there even if they
2 didn't participate to that extent in the rule making?

3 MR. BRESSLER: Well, they can say that. They have
4 said that--

5 THE COURT: Well--

6 MR. BRESSLER: --but I think we would, you know--

7 THE COURT: --we wouldn't say anything but you know
8 what I mean. Can they say it with merit? What's their
9 response to that, that's what I mean? I mean, is that you
10 didn't bring it up in the administrative proceedings so, as my
11 law school professor has said to me, too bad, so sad or is it,
12 is there some other answer to it?

13 MR. BRESSLER: Well, I think if it was so closely
14 related that it was obvious then that might be the case. If we
15 were talking about, again, Buzzards Bay and what they've been
16 doing in Buzzards Bay for some time and there was an
17 unexplained about face but there's no policy here. There was
18 no nationwide policy of tug escort requirements are okay.

19 THE COURT: Okay.

20 MR. BRESSLER: To the contrary, that was obviously at
21 issue in I think both in the *Ray* and also the *Locke* cases in
22 1972 or whenever and--

23 THE COURT: Right.

24 MR. BRESSLER: --2000 involving Washington state.
25 And this is a fact intensive process looking at what is

1 appropriate regulation. The facts may change but it's just,
2 it's not a continued line where there is an about face. It's
3 two separate lines. If the Coast Guard issued a rule tomorrow
4 changing things in Puget Sound, then I think it would have to
5 explain itself. If there was a body of water absolutely
6 identical in every way to Puget Sound where they were doing
7 something different, maybe that would be a closer question but
8 this is not a body of water identical in every way to Puget
9 Sound.

10 THE COURT: How does the regulatory decision here
11 turn on the peculiarities of Buzzards Bay?

12 MR. BRESSLER: Well again, Buzzards Bay is, it's
13 shallow, it's rocky as the Coast Guard expressed in the Rule.
14 Human error and groundings have been the cause of problems in
15 the past. That is solved by a double hull particularly along
16 with a federally licensed pilot and the movement reporting
17 systems so that the Coast Guard can be watching where vessels
18 are and what they're doing to help avoid collisions. And in
19 terms of groundings, that is a much more serious threat to a
20 single hull vessel because there's not another layer of
21 protection there and that's why there are tug escorts there.
22 But again, to require them for everything would remove the
23 incentive to move toward double hulls and to require them for
24 everything would crowd the bay more and it would just not be
25 necessary as the Coast Guard found.

1 THE COURT: Okay. What about the statutory change
2 that happened between the time of the Supreme Court's decision
3 in *Ray* and now, the one that the First Circuit noted in their,
4 this is on in footnote 21 which begins on page 15 but they--

5 MR. BRESSLER: Yes.

6 THE COURT: --actually note it on page 16.

7 MR. BRESSLER: Yes, I recall that. I would say two
8 things to that. One we said in our papers, which is *Locke* came
9 after *Ray* and *Locke* reaffirmed *Ray*. So for this Court or the
10 First Circuit that should be, for anyone with the Supreme Court
11 that should be the end of the matter but it's not just *Locke*.
12 *Locke* also recognized that in the Oil Pollution Act of 1990
13 Congress reaffirmed *Ray* and the preemptive scope of the Coast
14 Guard's authority.

15 I would also say that something not addressed in
16 either of our papers but the legislative history to those 1978
17 amendments belie what the Commonwealth is claiming.

18 THE COURT: Do you think Justice Scalia would think
19 it would be okay for me to read that?

20 MR. BRESSLER: Justice Scalia, given what he said,
21 may not, but you're not Justice Scalia so I'm going to argue it
22 regardless. Two things, first, the general purpose of the
23 legislation in 1978, and this is at, it's a House Report that
24 at the 1978 volume of the U.S. Code and Congressional
25 Annotative News, pages 3270 through 71, "that the purpose of

1 the legislation was to provide the Coast Guard with broader
2 and more extensive authority stated more explicitly to address
3 problems such as the safety of all 10 vessels foreign and
4 domestic." So it increased the Coast Guard's authority.

5 As to the specific claim that the change to the
6 section talking about waterfront structures versus vessels was
7 significant, the legislative history there is in I think the
8 same House Report 1978 USCCAN page 3283, makes it clear that
9 the waterfront safety provision in the new section 1225 that
10 the Commonwealth relies on is a specific recognition with
11 respect to structures and only with respect to structures
12 quoting again, that states, "employable subdivisions thereof IN
13 cases within their jurisdiction they prescribed higher safety
14 and equipment requirements and those prescribed by the
15 secretary." So it still is dealing only with structures not
16 with the vessels and that's what the Supreme Court said in Ray,
17 states have more authority with respect to their regulation on
18 things to protect the safety of waterfront structures and
19 vessels and that is just what Congress said in the report in
20 1978. And again, it makes sense that they weren't contracting
21 the Coast Guard's power because the overall purpose of the Act
22 is to increase the Coast Guard's power.

23 THE COURT: Okay. One last question I have for you,
24 there was a lot of questions, is there anything else that you
25 wanted to address before I turn to Mr. Cray that I didn't give

1 you the chance to because I was asking - you don't have to
2 have anything else, but I just want to give you the chance
3 since I didn't give you the chance to even say anything before
4 I started asking you questions.

5 MR. BRESSLER: Sure, I think I would just say again
6 what the First Circuit said was, you know, there may be a
7 conflict here. You haven't argued it sufficiently. You
8 haven't expressed it enough. There may be a regulation that
9 comes out that preempts this stuff and that is exactly what
10 happened. Under *Locke* and *Ray* the Coast Guard can act.
11 Congress reaffirmed *Ray* with the Oil Pollution Act of 1990
12 except in the context not relevant here. The Coast Guard has
13 acted pursuant to not clearly and consistent with that
14 authority and just on the face of the record what it has done
15 is reasonable. Factual findings with respect to things that
16 the Coast Guard did 15, 20, 25 years ago or more to the point
17 things it didn't do are not going to change the fact that what
18 it did here is reasonable and consistent with, certainly not
19 clearly inconsistent with congressional intent.

20 THE COURT: Okay. Mr. Cray?

21 MR. CRAY: Thank you, Your Honor. Obviously from our
22 papers we take a broader view of what the standard is than what
23 Mr. Bressler has articulated. It's fair to say his papers, the
24 bulk of their attention is a new theory of expressed preemption
25 that had not previously been advanced in the case and indeed I

1 don't believe the Coast Guard had advanced even as far back as
2 Ray. So for 29 years the law had been conflict preemption and
3 that's the rubric that the First Circuit addressed it in.

4 They also address--

5 THE COURT: But suppose it's conflict preemption--

6 MR. CRAY: Yes, Your Honor.

7 THE COURT: What would they need to show in order -
8 they need to show basically that the obstacles of their
9 regulation are impeded in some material way by your regulation
10 in order to have yours be conflict preempted, right?

11 MR. CRAY: I'm not sure that's what they would
12 argue--

13 THE COURT: Is that what you would argue though?

14 MR. CRAY: --but that's part of it. What - we would
15 argue the various questions you asked Mr. Bressler as to what
16 the First Circuit said we would agree those are things they
17 need to show. We also feel--

18 THE COURT: That is, one, that - well you agree
19 they've clearly expressed in this new regulation as to Buzzards
20 Bay their intents a preempt?

21 MR. CRAY: Yes, but we don't say validly for the
22 reasons in our counterclaim but--

23 THE COURT: But--

24 MR. CRAY: --I would agree that they're certainly
25 trying to say that.

1 THE COURT: Okay. And so do you think it's
2 inconsistent with clearly expressed - you think they have to
3 then show it's not inconsistent with clearly expressed
4 congressional intent.

5 MR. CRAY: Yes, Your Honor.

6 THE COURT: And then that it's a reasonable
7 accommodation of the conflicting policies and that it's not a
8 position that Congress, one that Congress would have
9 prohibited.

10 MR. CRAY: All of that, Your Honor, plus, and I would
11 direct specifically the Court to page eight of the First
12 Circuit's position, all that plus what Judge Lynch referred to
13 as standard conflict preemption analysis. And that's the usual
14 standard of either physical impossibility or obstacle to, as
15 stating as an obstacle to purpose, effectuation of purpose.
16 And it specifically would be in the F.3d version--

17 THE COURT: Yep.

18 MR. CRAY: --in the second full paragraph the third
19 sentence of that.

20 THE COURT: What does the sentence begin with?

21 MR. CRAY: It says, "rather state law in areas within
22 the province"--

23 THE COURT: Well--

24 MR. CRAY: --"of Title I"--

25 THE COURT: Right.

1 MR. CRAY: --"are subject to standard conflict
2 preemption analysis ordinarily"--

3 THE COURT: All right, so they said that your state
4 law and regulation as to Buzzards Bay stands as an obstacle to
5 the accomplishment and execution of the full purposes and
6 objective of Congress or in this case the Coast Guard
7 effectuating what Congress delegated to them in that among
8 other things they have made a determination that double hulls
9 don't require, and that's what we're talking about in the tug
10 escort, double hulls are fine. That there's already single
11 hulls are going to be eliminated in 2015, this is an incentive
12 that creating barges, having tugs for all these people is going
13 to clog up an already busy waterway and therefore create more
14 hazard than needed especially given these other safety
15 provisions they put in place and that on balance that this
16 appropriate and this is one where they think the balance should
17 be struck here and no more. Why wouldn't that be sufficient to
18 say that therefore requiring more will be an obstacle?

19 MR. CRAY: Okay, well let's first start both with
20 what the statutes, it's purposes are.

21 THE COURT: All right.

22 MR. CRAY: Title I's purposes are set out in 33
23 U.S.C. Section 1221 and they are annunciated as vessel safety
24 and environmental protection. They are not national
25 uniformity. That does not appear in the statute.

1 THE COURT: Right.

2 MR. CRAY: Similarly in this 2007 rule making that's
3 at issue in this motion, the Coast Guard again relied upon
4 those two basic purposes, navigational vessel safety and
5 environmental protection. It did not say a reason for imposing
6 this was for preemption or anything else was uniformity. So
7 our basic position has been that our, and this is that our law
8 further advances both of those goals. Their judgment is, and I
9 think this is a fair reading of what their actual, what appears
10 in the Federal Register, their judgment is, is this much and no
11 farther, we don't think this is sufficient, the words in the
12 Federal Register were sufficient. I don't believe I read
13 anything about it being affirmatively dangerous or creating an
14 affirmative hazard which I agree would be a horse of an
15 entirely different color. Instead it's basically that, Judge,
16 we feel this is enough. At most, that's simply a prediction of
17 what future risk might or might not be. It's not inconsistent
18 with either the goal behind the regulation or certainly the
19 statutory goal for the state to say we'd like to give a little
20 extra protection. That indeed was what the Coast Guard
21 originally itself contemplated in its 2004--

22 THE COURT: But in 1224, 33 U.S.C. 1224 it says,
23 "that in carrying out its duties and responsibilities the
24 secretary shall consider various factors." I have a copy if
25 you want to look at it if you don't have it. And it lists the

1 scope and the degree of risk or hazard involved, but among
2 other things it lists that economic impact and effects, this is
3 1224(a)(7).

4 MR. CRAY: Yes, Your Honor.

5 THE COURT: So why isn't that, I mean - and number
6 one, the scope and degree of the risk or hazard involved
7 sufficient, that's a word that suggests that at some point the
8 scope and degree of the risk or hazard involved is diminished
9 sufficiently to be resolved and economics. I mean, why isn't
10 that a consideration then that they can take into account and
11 therefore say even though your statute perhaps promotes more
12 vessel safety and perhaps promotes more environmental
13 protection that they're entitled to balance it that way and
14 preempt?

15 MR. CRAY: My response, Your Honor, would be that all
16 of those nine listed factors have to be construed in
17 conjunction with the prefatory language in A, "which all
18 relevant factors concerning navigation vessel safety and
19 protection of the marine environment." So for example, 7, I
20 don't view that economic impacts and affects given that
21 prefatory language that economic impact and effects is recently
22 construed as cost to the industry. I view it as what would be
23 the economic impact of the damage of an oil spill or the damage
24 to a vessel. So I think that all of that laundry list has to
25 be read in conjunction with the prefatory language in 1224(a)

1 which is also what is specifically stated right at the start
2 of Title I in 1221 as the purposes.

3 THE COURT: Do you think they can ever say, absent
4 them saying requiring the trade off of benefit for tug escort
5 for a double hull verse the clogging the waterways is - that
6 trade off isn't worth it because the clogging the waterway
7 poses a greater risk than the safety benefit, that would be
8 reasonably something they could fairly weigh. Putting that
9 aside cause if you say they didn't put it in the register and I
10 take it what you're saying is therefore they can't rely on it
11 now, that's your theory?

12 MR. CRAY: That's my best recollection of the
13 register. It doesn't - this theory--

14 THE COURT: And if it's not in there you're saying
15 then I can't, its not one of those things that the lawyers can
16 develop now.

17 MR. CRAY: Absolutely, Your Honor.

18 THE COURT: So it's not like rational basis analysis?

19 MR. CRAY: No, we would call that post talk
20 litigation rationalization.

21 THE COURT: Okay.

22 MR. CRAY: It's not adequate.

23 THE COURT: All right. So even if I accept that -
24 are you saying then that in the zone of just trade offs that
25 they can't ever preempt by saying it's sufficient. That if

1 you--

2 MR. CRAY: That's--

3 THE COURT: --if you want to go further, they've got
4 99.9% of the risk eliminated by there's a .1% risk if you will.
5 I'm not saying this is that, this case is that--

6 MR. CRAY: I understand, Your Honor.

7 THE COURT: --but that you could do that and they
8 can't say it's 99.9 is sufficient and preempt you out of that
9 .1?

10 MR. CRAY: Under Title I that would be our--

11 THE COURT: Under Title I.

12 MR. CRAY: That would be, yes, that - that what
13 Congress has said what the purposes are, it's to protect. And
14 all the state's trying to do is to protect. And it's not, it's
15 inconsistent with the basic congressional purpose for the Coast
16 Guard--

17 THE COURT: You could never be an obstacle if all
18 you're doing is protecting more?

19 MR. CRAY: Correct, you're protecting - exactly.
20 That's our core position and it's directly grounded in both the
21 statutory language and on the reasoning as to why they say that
22 they are doing this the 2007 rule which I would there
23 specifically cite the court to the Federal Register, 72 Federal
24 Register page 50,053 as to where I, that's where I read that as
25 the purpose.

1 So, but now still stepping back just to make clear
2 why we feel because the Coast Guard Act perhaps because they
3 anticipated the difficulty in making this obstacle the purpose
4 argument, their papers actually don't advance that contention.
5 Their claim instead is we don't have to deal with it. All we
6 have to show is an adequate statement of intent that meets the
7 additional standards that Your Honor in your colloquy with Mr.
8 Bressler set out.

9 THE COURT: You mean the reasonable accommodation
10 of--

11 MR. CRAY: Right, all of that. They don't have to
12 deal with the traditional conflict preemption test. That's
13 been their problem throughout this case. They can't satisfy
14 the traditional conflict preemption test. They ordinarily, as
15 here, haven't even argued it. Their basic goal has been to
16 find a way around it. They argued at length before the First
17 Circuit that all they had to say were the things that your
18 colloquy with Mr. Bressler said. But the First Circuit in our
19 view didn't accept it. And there were four specific pages I'd
20 like to direct the Court's attention to that support that.
21 First and foremost would be what we said on page eight, the
22 sentence that I first referenced to where they talk about
23 standard conflict preemption analysis. And then if you go to
24 the other, the second right hand column on page eight it spells
25 out the traditional test, physical impossibility.

1 Now also on page eight, and to us even equally
2 important, is if you go back to the First column, the carry
3 over paragraph from the first to second column is where the
4 First Circuit first starts to get into the idea of an adequate
5 expression of intent. And if you note it says in the second
6 line there, an initial inquiry.

7 THE COURT: I'm sorry, I'm missing where you're--

8 MR. CRAY: I'm sorry. So if you go, if this is on
9 page eight of the F.3d version--

10 THE COURT: Yep.

11 MR. CRAY: --the paragraph that starts up in the
12 right, I'm sorry, the left hand column at the bottom, starts
13 Locke's conflict--

14 THE COURT: Yes.

15 MR. CRAY: --preemption analysis--

16 THE COURT: I see that.

17 MR. CRAY: --involves an initial inquiry. That is a
18 very carefully chosen adjective because Judge Lynch repeats it
19 later on at page 18 of the decision where again she was
20 discussing at length these additional inquiries. But at page
21 18 this would be the first left hand column, first full
22 paragraph, starting more generally--

23 THE COURT: The initial question is whether the Coast
24 Guard has expressed an intent to preempt.

25 MR. CRAY: Right, where he says initial question.

1 So, and then, fine. Additionally, if the Court turns to page
2 19 the right hand column, the first full paragraph there saying
3 under these circumstances where it talks about the remand, and
4 there it certainly does talk about the sufficient clear intent,
5 but it says, and this is in the context of the Title I tug
6 escort challenge, in the second sentence, the parties should
7 have the opportunity to address among other issues. So the
8 whole premise of the Coast Guard's conflict - let me--

9 MR. BRESSLER: I think you missed a word.

10 MR. CRAY: I'm sorry. Other issues.

11 MR. BRESSLER: Among any other issues.

12 MR. CRAY: Any other issues. So the whole premise of
13 the Coast Guard's position is that the only question is has it
14 adequately and sufficiently expressed its intent? Our view is
15 the First Circuit's very clear, that is only the initial
16 question.

17 THE COURT: So what are the questions you think have
18 to be addressed.

19 MR. CRAY: All--

20 THE COURT: One, whether they've - the initial
21 question, right, of expressing intent.

22 MR. CRAY: As the Court developed with Mr. Bressler.

23 THE COURT: Right. Then what?

24 MR. CRAY: Either physical impossibility or obstacle
25 to purpose.

1 THE COURT: All right.

2 MR. CRAY: Those are the two prongs of the
3 traditional conflict. So they have to both satisfy what the
4 Court went through with Mr. Bressler and one of the two
5 traditional prongs of the standard conflict preemption
6 analysis. I mean, Judge Lynch used the phrase standard
7 conflict preemption analysis. Physical impossibility is
8 something that they've never argued the First Circuit itself
9 made light of at page 19. I don't think that's there before.
10 I think the real focal point under the traditional analysis--

11 THE COURT: Was obstacle.

12 MR. CRAY: --would be the obstacle part.

13 THE COURT: So you say if they can show intent and
14 obstacle they win and if they can't, they lose. And you say
15 they lose because yours is only to promote the environment and
16 the vessel safety and those are the only purposes that,
17 permissible purposes as a general matter for them to regulate
18 and the only bases in fact stated for the regulation and the
19 rule making and therefore all you're doing is more and you're
20 not an obstacle to accomplishing those goals. And that the
21 countervailing balancing considerations aren't ones that they
22 might - they're not ones that are obstacles within the meaning
23 of the statute.

24 MR. CRAY: Yes, Your Honor. We also have additional
25 arguments that if the Court were to accept that standard

1 conflict preemption analysis was still applicable and simply
2 was did they adequately address it? Did they adequately say
3 they really wanted to preempt? We also have arguments in the
4 brief as to why--

5 THE COURT: Why didn't they adequately say they
6 wanted to preempt?

7 MR. CRAY: I mean that - again, we concede they are
8 trying to say that. We have claimed on the counterclaim that
9 it's not a valid statement of intent for a variety of reasons.
10 First, they don't satisfy either under the Court, Your Honor's
11 formulation with Mr. Bressler the, for example take the
12 inconsistent but clearly expressed congressional intent. Our
13 view is congressional intent is clearly expressed in Section
14 1221. The purposes are vessel safety or environmental
15 protection. For the same reasons we argued under the obstacle
16 prong of conflict because standard analysis our right advances
17 those purposes so therefore to preempt them and strike it down
18 would be inconsistent with what is specifically laid out in
19 Section 1221 as clear intent. For the same reason when they
20 talk about an accommodation of conflicting purposes, I've read
21 several of the cases. I believe what the Court's referring to
22 in that formulation is conflicting state and federal
23 objectives. Here, again we feel even under that standard there
24 is no conflict because the federal goal is protection. That's
25 ours as well. They're both going in the same direction.

1 Finally, the additional grounds that are the basis
2 of our counterclaim is aside from those we feel that the state
3 both the statement in the regs preamble and the reg itself,
4 it's a statement necessarily is sort of built upon, both
5 violate the APA because each are arbitrary and capricious. In
6 a nutshell our challenge to the statement of preemption being
7 arbitrary and capricious is because it provides no explanation,
8 our main argument is it provides no explanation for the
9 inconsistent treatment of all of the tug escort rules, state
10 supplemental tug escort rules on the West Coast.

11 There are some, again, Mr. Bressler is now at counsel
12 table advancing explanations they don't appear in the
13 regulation itself.

14 THE COURT: What do I have before me as to what those
15 rules are and what the state of the--

16 MR. CRAY: We'll give you various citations to
17 judicially noticeable state statutes--

18 THE COURT: All right.

19 MR. CRAY: --or Federal Register sections. I'm
20 sorry--

21 THE COURT: Go ahead.

22 MR. CRAY: But specifically with respect to Puget
23 Sound the one in particular I want to pay the most attention to
24 is its 1992 statement. And there it would be 57 Federal
25 Register at 30,064. There again as I read it, the description

1 there, my recollection is that you have, again, a federal rule
2 of single hull, of tug escorts for single hulls and then a
3 state requirement of tug escorts also for double hulls,
4 basically the same structure that's laid out here.

5 If Your Honor refers to that specific page it says it
6 doesn't intend to preempt. Even though it's putting in a
7 single hull escort rule, it doesn't intend to preempt the
8 supplemental state requirement because it says, here I do have
9 the quote, "there does not appear to be any substantial
10 conflict." Well, I don't know what the difference is between
11 the East Coast and the West Coast. Is it some difference in
12 the salinity of the sea water? I don't know what it is and no
13 one does. The Coast Guard hasn't provided any explanation and
14 it simply isn't rational for it to have stated that with
15 respect to Puget Sound. I believe the Puget Sound regulation
16 is still in effect and indeed you do have these additional
17 variant escort requirements up and down the West Coast in
18 various harbors and while they maybe haven't specifically
19 blessed them like they did the Puget Sound one they still are
20 allowing them to exist. And I don't think it takes a, I don't
21 know if the Court's question is was there a specific comment
22 addressing this in the proceeding. I can't answer that right
23 now. I can say that in this litigation before the federal rule
24 came out before the First Circuit there was extensive back and
25 forth letter writing between the parties on this very point.

1 It didn't, had not come to the Attorney General's attention.
2 We hadn't discovered these variant West Coast practice until
3 after the First Circuit argument spun and we brought it to the
4 Court's attention then. They responded. So certainly the
5 Coast Guard was on notice of this as a major point of concern.

6 We don't think there needed to be a comment, that
7 this - of such a basic 180 degree turn in practice was enough
8 for them to need to address as to why. But, so that's one
9 argument why the preemption statement is arbitrary and
10 capricious. It's in our counterclaim it'll be teased out. I'm
11 sure they'll have a dispositive motion coming. They're talking
12 about--

13 THE COURT: Do you think the failure to raise that in
14 the notice and comment period part of the rule in some way
15 affects the merits of that claim?

16 MR. CRAY: I'm not sure. First of all, I'm not sure
17 factually if it was or wasn't raised. I can't respond
18 definitively one way or the other.

19 THE COURT: Okay.

20 MR. CRAY: Secondly, we certainly would be arguing
21 that this basic 180 degree turn in practice doesn't need to be
22 a comment. They have an obligation to the citizens of
23 Massachusetts - (inaudible - #4:01:47) - to explain why they're
24 doing things so differently in one place vis-a-vis another.
25 But that will be, I'm sure that will be the subject of they're

1 going to be filing, responding and I'm sure will be
2 dispositive motions on February 15th. I'm sure that'll be drawn
3 out then. But certainly at this stage we would urge the Court
4 not to, above all, grant an interlocutory relief when there is
5 in the least a very open question as to the validity--

6 THE COURT: What's the February 15th date?

7 MR. CRAY: When we filed the counterclaim it was an
8 assented motion as I recall to simply get the counterclaim on
9 file--

10 THE COURT: Right.

11 MR. CRAY: Part of that agreement was that they would
12 have a perfectly adequate period of time until February 15th to
13 file their--

14 THE COURT: And to file responsive pleading.

15 MR. CRAY: --their Rule 12 response, correct, Your
16 Honor.

17 THE COURT: I see. So February 15th is the deadline
18 for their answer or their motion to dismiss.

19 MR. CRAY: Correct.

20 THE COURT: I see. Okay.

21 MR. CRAY: And so that will be. Now the counterclaim
22 also brings into question the legitimacy of the underlying reg
23 itself. What I previously was going at was the, we think the
24 preemption statement which is in the preamble, not the reg
25 itself--

1 THE COURT: Right.

2 MR. CRAY: --but in the preamble part of the Federal
3 Register, we're saying that's arbitrary and capricious. We're
4 also saying, we're also challenging the regulation itself as
5 arbitrary and capricious and therefore any preemptive statement
6 based upon it would collapse on itself because it's built upon
7 a regulation that itself is not valid. In our, we have several
8 arguments I believe for the challenge to the regulation as
9 arbitrary and capricious but the biggest one is that there's
10 not an adequate explanation of why they didn't extend the
11 protection, the double hulls which is what they had allowed the
12 state of Washington to do by itself, what they were initially
13 thinking of doing in 2004 even as regards Buzzards Bay. The
14 2004 advance notice, the first thing they put out vis-a-vis
15 Buzzards Bay talked about all laden barges. I believe perhaps
16 about a certain weight but basically didn't have the single
17 hull, double hull distinction. That went away in the actual
18 proposed rule and stayed away in the final one. There were
19 comments brought to the Coast Guard's attention during the rule
20 making and Mr. Ettinger can address them more fully about a
21 very serious oil spill in the Gulf Of Mexico involving a double
22 hulled vessel that I believe was 30 million gallons or a very
23 large amount. The Coast Guards response or they didn't address
24 what had happened in the Gulf of Mexico. They simply said,
25 relied on the fact there hadn't yet been a spill in Buzzards

1 Bay. With respect, we think that harkens back to the old and
2 often criticized common law tort rule that if you had a dog
3 that bit someone else you couldn't be sued unless you had
4 already been aware the dog was dangerous because it had bitten
5 before. It was kind of colloquially referred to as the
6 adoption of one free bite. It's essentially what they're
7 trying to do here. They're saying they have the right to one
8 free spill before. We think that rationale is utterly
9 incompatible with a statute where regs being promulgated under
10 a statute with specific purpose of protecting the environment.
11 So those in the least there should be a clearer sense of the
12 validity of the basic regulation and the statement before we
13 even get to the idea of using it as a vehicle to preempt state
14 law.

15 Now perhaps anticipating again some of their problems
16 with conflict preemption that plague them throughout the case,
17 again I do want to address what was the major centerpiece of
18 their papers which was this new theory of expressed preemption.
19 Now, this is a very significant argument because there is the
20 whole difference between conflict preemption and expressed
21 preemption is they don't have to show an actual conflict to
22 expressly preempt. It gives the agency much more power.
23 Obviously that's very significant for both the federalism and
24 even a separation of power.

25 THE COURT: You're essentially, as I understand your

1 argument, saying they can't expressly preempt here for two
2 reasons. One, that they don't have an authorization from
3 Congress to engage in express preemption. And two, because
4 the, and it's sort of the other side of the coin of your
5 obstacle argument, that anything that's merely advancing,
6 anything that's solely advancing vessel safety and
7 environmental protection is consistent with the purposes of
8 Congress and can't be, and sort of by definition can't be
9 preempted under conflict analysis cause it can't stand as an
10 obstacle to something that also can only engage in the purpose
11 of advancing safety and, vessel safety and environmental
12 protection. That's basically--

13 MR. CRAY: Yeah, I think as to why they don't - we do
14 stated orally, sir, they don't have the authority to engage in-
15 -

16 THE COURT: Right.

17 MR. CRAY: --express preemption. We have actually
18 three separate reasons for that. The first is that we view the
19 Supreme Court as having already ruled on what type of
20 preemption rubric you're looking at.

21 THE COURT: I got that, right.

22 MR. CRAY: All right. And that will be page 109 of
23 the *Locke* decision.

24 THE COURT: Yep.

25 MR. CRAY: It says the analysis under Title I is one

1 of conflict preemption. Our basic point is what was the need
2 for all of the extended discussion in first *Ray*, then *Locke* in
3 all this 29 years of law development under conflict and field
4 preemption if all they can do is they can just waive a magic
5 wand and expressly preempt. So we don't, we think the reason
6 why they never - I'm not aware they had previously argued it
7 until mid way through this case, is because it's clear they
8 don't have that authority. But additionally, in addition to
9 the - I think they would concede there's no specific statement
10 in Title I or even anywhere in the PWSA saying they have the
11 authority to engage in express preemption. Their theory more
12 is one of implied. We think that cuts against the grain of the
13 recent Supreme Court trend at narrowing some particularly
14 expansive agency power, particularly the *Alexander v. Standavol*
15 (*ph*) case, we started to read, which says they can't, "agency
16 on its own without statutory authorization can't create a
17 private right of action cause of the extraordinary nature of
18 that action." Justice Scalia had a fairly memorable quote,
19 "They can play the sorcerer's apprentice but not the sorcerer
20 himself." Same thing we would claim applied to what's an even
21 more intrusive act expressly preempted duly enacted state law.
22 We're not alone in this view. Just in 2000, you know, earlier
23 this year--

24 THE COURT: I read that--

25 MR. CRAY: Okay.

1 THE COURT: --with - (inaudible - #4:08:41).

2 MR. CRAY: And we also view those three justices who
3 are not rebutted by the five Judge Rigardi (ph) there. They
4 just didn't address it, didn't reach it, but those three
5 justices also read the various cases that appear, the major
6 cases that appear in the Commonwealth's original memorandum as
7 the basis for their right to engage in express preemption.
8 They read them as more in the nature of conflict preemption
9 case in that there was the federal regulation, the effect of
10 the federal regulation created a conflict with state law. And
11 so, I'm sorry, Your Honor--

12 THE COURT: I'm just - I understand that. Anything
13 you want to say about the above memo of this? If there's
14 something specific like a minute or two about the tug Manning,
15 I mean that might, that is materially different? I'm just -
16 the only reason I'm saying it is I want to give Mr. Bressler, I
17 don't know if he wants a chance to respond, I imagine he does,
18 a couple minutes and I sort of need to wrap up at three and so-
19 -

20 MR. CRAY: Certainly, Your Honor.

21 THE COURT: And I don't know if Mr. Ettinger wants to
22 say anything or not.

23 MR. CRAY: I believe he does but--

24 THE COURT: All right. So that's why I just wanted
25 to - is there something--

1 MR. CRAY: Sure.

2 THE COURT: --like in a minute you want to say with
3 respect to the Manning?

4 MR. CRAY: No. Most of the arguments that we're
5 putting out here--

6 THE COURT: Carry over to one or the other.

7 MR. CRAY: --would apply to that. There are some
8 additional, some specific arguments that are unique to the
9 escort provision but most of them would also directly apply to--
10 -

11 THE COURT: Okay.

12 MR. CRAY: There's nothing, put it this way, there's
13 nothing Congress has, there's nothing that's unique to Manning.

14 THE COURT: Okay. Mr. Ettinger--

15 MR. ETTINGER: I'll make it very--

16 THE COURT: --maybe Mr. Ettinger can respond to both.

17 MR. ETTINGER: I will make it very brief, Your Honor,
18 because I understand you're--

19 THE COURT: Okay.

20 MR. ETTINGER: --limited time. I would like Mr.
21 Bressler to have the opportunity to respond if he wants it. I
22 just want to address one point that--

23 THE COURT: Yep.

24 MR. ETTINGER: --in addition to what's in our papers
25 which I understand you've already read about the irreparable

1 harm--

2 THE COURT: Right.

3 MR. ETTINGER: --and the significant risk to harm to,
4 risk of harm to Buzzards Bay and its wildlife. And I just want
5 to highlight the relationship between what's gone on in Puget
6 Sound and what's gone on here. As Mr. Cray just pointed out in
7 deciding that there was no preemption of the law at Puget Sound
8 the Coast Guard made a determination there was no substantial
9 conflict. And yesterday I received from the Coast Guard as
10 part of its supplemental discovery, which is still ongoing by
11 the way, a document I'd like to hand up to the Court if I may.

12 THE COURT: All right. Does the government have a
13 copy or do you have a copy for them?

14 MR. ETTINGER: I'll hand them a copy.

15 THE COURT: All right.

16 MR. ETTINGER: And I honestly haven't gone through
17 everything in the documents that were produced just yesterday,
18 Your Honor.

19 THE COURT: This is a document that came from the
20 government?

21 MR. ETTINGER: This came from the government. They
22 sent of a CD of--

23 THE COURT: Right.

24 MR. ETTINGER: --their documents--

25 THE COURT: Yep.

1 MR. ETTINGER: --yesterday, just some additional
2 documents. This is a U.S. Coast Guard categorical exclusion
3 determination with respect to this regulation that we're now
4 talking about. And it is from April 3rd of '07. And there is a
5 determination here that this regulation, if you look at the end
6 of the second paragraph, they're saying there's no reason for a
7 NEPA review--

8 THE COURT: Uh-huh.

9 MR. ETTINGER: --National Environmental Policy Act
10 Review. And it says the reason for it is since implementation
11 of this action will not result in any, and if you skip down to
12 point three, it will not result in any inconsistencies with
13 federal, state or local laws or administrative determinations
14 relating to the environment. That is just what they said in
15 Puget Sound as to why there was no preemption. And with that
16 I'll sit down, Your Honor, and pass it over to Mr. Bressler.

17 THE COURT: All right.

18 MR. BRESSLER: Your Honor, I just said that in April,
19 in April there was a permanent injunction in place barring
20 every provision of this law that we have challenged. So there
21 was no inconsistency with any law bending effect. I will try
22 to be as quick as I can because there's a lot I would take
23 issue with from what Mr. Cray said. First, I would say the
24 conflict with purposes test, the Supreme Court made it clear in
25 *Fidelity Federal Savings v. De LaCuesta*, which we cite in our

1 papers and also *City of New York v. FCC*, that the in *De*
2 *LaCuesta*, the Supreme Court criticized the Court of Appeals
3 below for focusing too much on the congressional intent when it
4 was regulatory preemption. So what the Court should have been
5 looking at was the agency's intent. Here there is a very broad
6 delegation and commitment of authority to the executives, to
7 the Coast Guard. That's the authority being exercised. The
8 obstacle to the purpose is is the obstacle to the purposes of
9 the Coast Guard. I would say it's also an obstacle to the
10 purposes of the Congress because in light of what I read you
11 before one of the points of the most recent amendment or this
12 1978 amendment to the Ports and Waterway Safety Act of '72 was
13 to give the Coast Guard greater authority.

14 The reason that there is, I mean this whole express
15 conflict preemption alleged dichotomy I think is a false
16 dichotomy because what the Coast Guard has done here with its
17 expressed statement is made it crystal clear, expressly clear
18 that there is a conflict between the state law and the agency's
19 intent, the agency's purposes to set the regulation here, no
20 less and no further. In terms of whether the agency is
21 empowered to engage in some other sort of express preemptions,
22 we cited in our papers there is no need for an expressed
23 congressional delegation of the right to preempt in--

24 THE COURT: But that kind of conflict is really an
25 obstacle conflict; isn't it?

1 MR. BRESSLER: Yes.

2 THE COURT: I mean that's really what it--

3 MR. BRESSLER: Yes.

4 THE COURT: It either is an obstacle or it isn't, but
5 that's the kind of--

6 MR. BRESSLER: Yes.

7 THE COURT: Okay.

8 MR. BRESSLER: As to this kind of the cost benefit
9 question that Your Honor raised, first of all, it's in the
10 statute, I mean, yes, the cost of the environment of an oil
11 spill is certainly and to the people of whatever state,
12 whatever community we're talking about is a great cost. But
13 the cost of measures to prevent that there's a cost there also.
14 There needs to be a cost benefit analysis. By the
15 Commonwealth's logic they're acting arbitrary and capriciously
16 for not banning all tank vessel traffic whatsoever from
17 Buzzards Bay and all of its waters. In fact only sailboats
18 because, you know, anything could leak fuel. Obviously that
19 was not Congress' point. There's going to be some cost benefit
20 here and that's what the Coast Guard was engaged in. They're
21 required to engage in that by executive orders as well as the
22 PWSA.

23 The question of the rationale of not wanting too many
24 vessels so that the helpers become an hinderer, I think it is
25 not - what the final rule says in terms of response to comments

1 is we don't think that will be too much of a problem here
2 because single hulled vessels are being phased out so by 2015 it
3 won't be an issue. In the earlier iterations of this rule
4 making the advance notice of proposed rule making and the
5 notice of proposed ruling as well as the public hearings and
6 other statements--

7 THE COURT: For the one that just got enacted we're
8 talking about?

9 MR. BRESSLER: Yes. I mean there was an advance
10 notice of proposed rule making in 2004.

11 THE COURT: Oh, I see. Okay.

12 MR. BRESSLER: There was a notice of proposed rule
13 making in 2006.

14 THE COURT: Yep.

15 MR. BRESSLER: And then there was the final rule in
16 August that took effect November 28th. Clear in those documents
17 is the concern that there not be crowding. It's not explicitly
18 said, you know, we think we'll avoid it but it's obviously a
19 logically outgrowth of what the Coast Guard did say.

20 As to the APA question, I mean first of all I would,
21 again, it's not irrational to not bar all vessels from
22 Massachusetts waters which is where Mr. Cray's argument ends
23 up. In terms of the comment from the coalition about the
24 vessel, the Coast Guard is not required to respond to every
25 comment it receives, just significant ones. It did respond to

1 that comment. It responded to three comments, one of which I
2 believe was the coalitions that said you should apply this to
3 double hulls. And it said well we don't think that's necessary
4 because this is sufficient. It didn't respond to the point
5 about the accident in the Gulf of Mexico. The accident in the
6 Gulf of Mexico was caused by human error. A barge drove into a
7 submerged oil platform. There are no submerged oil platforms
8 sunk by Hurricane Rita in Buzzards Bay. The problem there is
9 rocky and uneven, shallow ground. And that's what they talked
10 about and why that problem did not require tug escorts for
11 double hulled vessels.

12 And finally, in terms of this there needs to be an
13 explanation for inconsistent treatment, the Ports and Waterway
14 Safety Act includes an extremely broad commitment of authority
15 to the Coast Guard to issue regulations on this basis,
16 sometimes on an emergency basis. The captain of the port may
17 do something just for a day. It happens all the time. The
18 Coast Guard cannot be required to explain how what's it doing
19 here is different from what it did somewhere else 25 years ago
20 every single time it does that. There was no nationwide policy
21 ever promulgated by the Coast Guard or Department of
22 Transportation or Homeland Security or anyone else that state
23 tug escort rules are fine. To the contrary, they were at issue
24 with *Locke*. They were at issue with *Ray* and they're at issue
25 here.

1 THE COURT: What about the question though of it
2 appears that detente was reached so to speak on tug escort
3 rules in West Coast ports as applied to certain bigger ports.
4 That's - I haven't gone, I've read all the papers but I haven't
5 read all the state regulations and Coast Guard regulations yet
6 out in the West Coast that were cited. But the sense I'm
7 getting is that out there sometimes defacto, sometimes dejure,
8 those state regulations in local ports were permitted by the
9 Coast Guard and continue to be permitted. And some form of
10 détente, if you will, was reached on that and here not so.
11 What's the, I mean what's really going on?

12 MR. BRESSLER: Well, first I would say I don't think
13 I can address what you refer to as the defacto détente because,
14 again, this Title I analysis of conflict doesn't come into play
15 until there's an affirmative decision. There were no
16 affirmative decisions anywhere except arguably Puget Sound and
17 here, at least in terms of the rules that they're citing--

18 THE COURT: Yeah.

19 MR. BRESSLER: --Puget Sound and Massachusetts
20 regarding tug escorts. In terms of why is this different from
21 what happened there, all that I can--

22 THE COURT: I'm asking this in the practical not the
23 legal question.

24 MR. BRESSLER: Well, I think the Coast Guard in terms
25 of its preemption statement, I don't know if it would say the

1 same thing today about Puget Sound that it did in 1994. I
2 don't think it's amended in that respect recently. All I can
3 really say is that they are different--

4 THE COURT: Okay.

5 MR. BRESSLER: --bodies of water in different places.

6 THE COURT: Okay. Fair enough.

7 MR. BRESSLER: And these are, you know, political
8 bodies and regulatory bodies coming to agreements. Beyond that
9 I don't know--

10 THE COURT: Okay.

11 MR. BRESSLER: --who was the congressman for that. I
12 know Mr. Benner wanted, Your Honor, if you had time--

13 THE COURT: Do you have something you want to say
14 quickly?

15 MR. BENNER: Well, Your Honor, I'll try not to impose
16 on your time. I know you're at the end of it. I would just
17 say that the clients are represent are the people who operate
18 under this regime. The case is really about who decides. The
19 way it's been presented here--

20 THE COURT: Yep.

21 MR. BENNER: --either the federal government has the
22 authority to make these decisions or the state has authority
23 pretty much on its own say so to pull out from that federal
24 system and interpose something different. Now--

25 THE COURT: Something more.

1 MR. BENNER: Well, something more is the easier
2 argument for them. I'm not conceptually why it wouldn't be
3 something less. But it puts the Court, what we look for--

4 THE COURT: I don't think even Mr. Cray would argue
5 that they could impose--

6 MR. BENNER: But how do you quantify - excuse me for
7 interrupting, Your Honor,--

8 THE COURT: That's all right.

9 MR. BENNER: --but I mean how does one make that
10 quantification? You get into very subjective judgments about
11 what's better and what's worse. What we as industry look to is
12 there's an expert agency acting nationally that could make
13 differentiations because of - it's a fairly flexible system in
14 other words because when we argue these kinds of cases and it's
15 been my unhappy history that I've argued a number of them, but
16 when we argue these kinds of cases generally what we hear from-
17 -

18 THE COURT: Must be good for your billings.

19 MR. BENNER: I can't comment.

20 THE COURT: That's okay; you don't have to comment on
21 that.

22 MR. BENNER: Your Honor, generally what we encounter
23 is we're arguing for national uniformity and we hear as a
24 counter argument oh, no, no, you have to be sensitive to
25 conditions of local waters. In fact what the federal system is

1 and when you look at 33 CFR 165 and see how it's structured,
2 the Coast Guard makes adjustments and modulations for different
3 bodies of water when it sees fit but still there's an entity
4 there that has that national overview that can make some - it
5 may not always be right but it certainly has the authority and
6 the expertise to make judgments about how far it can deviate
7 from one body to another without upsetting a generally
8 commercially and environmentally acceptable regime of a
9 national system for transportation, just like you want a
10 national system for aviation. So that's our concern in this.
11 Our interest, we did not file papers in this because our
12 ultimate interest are subsumed in the federal interest that's
13 being asserted here. But we very much have a stake in this not
14 having to be a matter of minute entrail examination of every
15 part of every rule that comes up in conflicts between states
16 and the federal government. We think that what the Supreme
17 Court has established and will ultimately be prudent as this
18 case evolves is that there is a very clear guideline here.
19 We're dealing with Title I issues and the government acts, the
20 federal government act that pushes aside any state rule. To
21 the contrary, if it hasn't acted and it's not decided
22 affirmatively not to act, then there may be some room for the
23 state to act in these discretionary areas but that's our
24 interest here. And we'd like to get this process going in a
25 direction where it could be decided quickly. It will be three

1 years next month I think since this has been filed. It should
2 be easier than this. Thank you, Your Honor.

3 THE COURT: I'll give you the best promise, which is
4 not judicially enforceable, which is that I will do my best to
5 resolve it as fast as I can in light of both the obviously
6 significance of the issue and the amount of time and effort
7 that all of you have put into it which I know is great and so
8 that I can deliver something that, whether you like it or not
9 at least is complete, careful and thorough.

10 MR. BENNER: Your Honor, may I ask a question--

11 THE COURT: Yep.

12 MR. BENNER: --procedurally. You have before you a
13 motion from the government seeking leave--

14 THE COURT: Preliminary and permanent.

15 MR. BENNER: --preliminary injunction. It strikes me
16 that all the issues that are before you now are issues of law
17 that are susceptible of summary disposition. Is there a point
18 now or by submissions to suggest to the Court some process for
19 getting this new--

20 THE COURT: Well, let me tell you how I understood
21 that issue as it percolated in the papers. You've moved, Mr.
22 Bressler, for preliminary and permanent injunctive relief. And
23 Mr. Cray you've opposed it across the board. To the extent
24 that, and ultimately this is really a question for Judge
25 Lindsay cause this is just here to me on a referral and I'm

1 sure whatever I say it's going to be subject to at least
2 objections from half of you if not all of you, but if, as a
3 practical matter, if I recommend for permanent injunctive
4 relief, that amounts to I think, and if Judge Lindsay accepts
5 that, that as a practical matter I think that amounts to a
6 final determination that I - I mean, step back. There's one
7 theory the plaintiff, that's the government, has which is a
8 narrower theory in terms of all the issues that it raises in
9 terms of discovery and the like. Everybody agrees upon that
10 and agreed to proceed at least for briefing purposes on that or
11 at least once Judge Lindsay laid out how he wanted to go, that
12 issue gets resolved. If it gets involved against the
13 government, then you reach all those other issues and whatever
14 further development of the record is required. If you don't,
15 and they prevail on that then I guess the question becomes
16 whether or not you want judgment to enter on that issue, and if
17 people are going to appeal, go up on that issue or not or
18 whether - but I mean I think, I'm not sure what - now if they
19 get a preliminary injunction, Mr. Cray, you have your
20 objections, but what's really left as to that issue for prelim,
21 you know, between the preliminary and permanent relief?

22 MR. CRAY: I think the premise of what Mr. Benner is
23 requesting here we would disagree with which is that it's
24 purely a matter of law. We feel very strongly we want
25 discovery. I purposely have not gotten into the discovery

1 dispute between the parties that was the subject for the last
2 papers. And we feel actually the Court itself doesn't need to,
3 the arguments we previously set forth should be sufficient to
4 deny this interlocutory motion and certainly a motion for
5 permanent relief and let the matter just go forward with
6 discovery being resolved with the usual consultation among
7 counsel, Rule 37--

8 THE COURT: Right.

9 MR. CRAY: --if necessary et cetera. But I certainly
10 don't want to make it sound like the Commonwealth is
11 acquiescing at any assertion by any of the plaintiffs that this
12 is purely a matter of law. We strongly believe--

13 THE COURT: No, I understand that.

14 MR. CRAY: And obviously just the fact that this is
15 not just in our view a matter of law, but it is something where
16 discovery is appropriate and we feel a fair reading of the
17 transcript of the status conference before Judge Lindsay is
18 that he also at least seems intent of allowing us to get
19 discovery at least at that point agreed there were matters that
20 needed to be explored factually. We're not saying he down the
21 road--

22 THE COURT: Let me ask you both, do either of you
23 wish to file a reply or a sur-reply? You don't have to. I'm
24 not telling you to, but I'm just asking if that is something
25 that you want to do. If you don't want to do any more briefing

1 I'm not telling you - this is not an implied suggestion to say
2 yes. I'm just asking if you want to or not. If you don't, I'm
3 content to proceed now. If you want to, I'd be prepared to let
4 you file three to five pages and then an equivalent sur-reply.
5 If you don't want to, you don't have to.

6 MR. BRESSLER: I would say, Your Honor, we are - we
7 haven't talked about irreparable harm. One of the sovereign
8 entities here is going to be harmed by the Court's decision,
9 either the U.S. or the Commonwealth. We would argue that the
10 supremacy clause does the balancing for the Court, but that
11 aside we are very interested, like Mr. Benner, in a prompt
12 resolution so having discussed everything as we have today, if
13 Your Honor wants more certainly we would be happy to provide
14 it--

15 THE COURT: Okay.

16 MR. BRESSLER: --and same with Judge Lindsay but I
17 would not say--

18 THE COURT: Fine.

19 MR. BRESSLER: --I'm eager to--

20 THE COURT: I'm content to leave it the way it is and
21 if in reviewing it and writing it up I see something that
22 requires something then I'll issue a little order that says
23 brief just this question.

24 MR. CRAY: To the extent to which there's the further
25 question of permanent relief, which I know is in the title of

1 the motion but it's only a single sentence of actual
2 development, there again, just to be clear, we strongly
3 believe--

4 THE COURT: I understand that.

5 MR. CRAY: Okay.

6 THE COURT: Yep. Thank you very much.

7 COUNSEL: Thank you, Your Honor.

8 THE COURT: Very helpful, very interesting issue.

9 COUNSEL: Thank you, Your Honor.

10 THE COURT: All rise, this matter's adjourned.

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CERTIFICATION

I, Maryann V. Young, court approved transcriber, certify that the foregoing is a correct transcript from the official digital sound recording of the proceedings in the above-entitled matter.

/s/ Maryann V. Young

June 9, 2008

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Certified Court Transcriber
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